United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2068

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

WAYNE CARLSON,

Plaintiff-Appellant.

v.

R. KENT STONEMAN, Commissioner of Corrections for the State of Vermont, PAUL DAVALLOU, Warden, Vermont State Penitentiary, JULIUS MOEYKENS, Warden, Vermont State Penitentiary, THREE UNKNOWN CORRECTIONAL OFFICERS, acting in their capacities as Corrections Officers at the Vermont State Penitentiary,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

BRIEF OF DEFENDANTS-APPELLEES

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

WAYNE CARLSON,	)	
	)	
Plaintiff-Appellant,	)	
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v.	)	Docket No. 75-2068
	)	
R. KENT STONEMAN, Commissioner of Corrections for the State of Vermont,	)	
	)	
PAUL DAVALLOU, Warden, Vermont State Penitentiary,	)	
	)	
JULIUS MOEYKENS, Warden, Vermont State Penitentiary,	)	
	)	
THREE UNKNOWN CORRECTIONAL OFFICERS, acting in their capacities as Corrections Officers at the Vermont State Penitentiary,	)	
	)	
Defendants-Appellees.	)	

I. STATEMENT OF THE ISSUES

1. Appellees contend that the trial court did not err in holding that the hearing procedure provided Plaintiff incident to out-of-state incarceration, which procedure allowed for the prison warden to act as hearing officer, did not violate Plaintiff's rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Appellees contend that the trial court did not err in holding that, in the hearing procedure provided Plaintiff incident to his out-of-state incarceration equal protection did not require that the Plaintiff be afforded legal counsel and a hearing officer other than the Warden.

II. STATEMENT OF THE CASE

(Appellees stipulate to Appellants Statement of the Case.)

III. STATEMENT OF THE FACTS

On March 14, 1974 Plaintiff Wayne Carlson was transferred from the Windsor State Prison in Windsor, Vermont to the Federal Prison located at Lewisburg, Pennsylvania. (Appendix p. 116.)

Prior to that date, on May 27, 1973, the Plaintiff had, with the use of a loaded revolver, taken hostages and escaped from the Burlington Correctional Center, Burlington, Vermont. (Appendix p. 111, Transcript pp. 45-48.) On June 3, 1973, Plaintiff, who had been transferred to Windsor Prison subsequent to the May 27th escape, missed a prison check by placing a dummy in his bunk and was apprehended four hours later hiding in a cupboard in the Arts and Crafts section of the prison. (Appendix p. 111, Transcript pp. 49-53.) On July 7, 1973 Plaintiff escaped from Windsor Prison and was apprehended later in New Hampshire. (Appendix p. 112, Transcript pp. 53-54.)

On September 28, 1973 Plaintiff with the use of a gun disarmed and escaped from Deputy Sheriffs in Burlington. (Appendix p. 112, Transcript pp. 70-71.) On November 5, 1973, Plaintiff escaped from "A" Block, the maximum security portion of Windsor Prison, using a knife and tieing up a correctional officer. (Appendix p. 112, Transcript p. 55.) Plaintiff was apprehended in Boston in January, 1974. (Appendix p. 112, Transcript p. 55.) Finally on March 11, 1974, Plaintiff, accompanied by inmate Anthony Tanzi[1], again escaped from "A" Block by threatening several officers with a knife, tieing them up, and then effecting his escape over the "A" Block roof. (Appendix p. 112, Transcript pp. 55-56.) Plaintiff was apprehended a short time later in Windsor when the car he was using was run off the road by officers giving chase. (Appendix p. 112, Transcript p. 56.) Upon his return to the Windsor facility, Plaintiff was immediately placed in punitive segregation. (Appendix p. 113, Transcript pp. 290-291.)

Earlier on that same day, March 11, Defendant Moeykens, the warden, had contacted his superiors in the Department of Corrections to inform them of Plaintiff's escape. (Transcript p. 132.) On order from the Commissioner, the Deputy Commissioner Cornelius Hogan, reviewed on that date Plaintiff's case history. (Transcript pp. 260,267.) Hogan determined that the Plaintiff was a daring individual with no regard for his own personal safety or the safety of others. (Transcript, p. 260.) In accordance with

[1]Tanzi who had escaped only once previously was not considered for out of state placement but was disciplined within the prison following prison disciplinary procedure. (Appendix p. 115, Transcript pp. 112-115, 117).

Department policy, Hogan reviewed the feasibility of housing the Plaintiff at other Vermont facilities and determined that none were adequate to hold him. (Appendix pp. 102, 112-113, Transcript pp. 260-263.) After reviewing these conclusions with Commissioner Stoneman, it was tentatively decided that the Plaintiff be transferred to the Federal prison system. (Transcript pp. 267-268.) Later that day, Warden Moeykens was informed of the tentative decision to transfer Plaintiff if following a hearing Plaintiff could offer no reasons why transfer should not occur. (Transcript pp. 135, 268.) In appointing the Warden as hearing officer, it was understood that he had authority to make a recommendation that would be carefully considered by the Commissioner. (Appendix p. 113, Transcript pp. 269-271.) The Warden then contacted Lewisburg Federal Prison to inform them that they might be receiving a transfer from Vermont. (Transcript p. 137.)

On the evening of March 11, Defendant Moeykens verbally notified the Plaintiff that the State proposed to transfer him to the United States Penitentiary at Lewisburg. (Appendix p. 113, Transcript pp. 137, 157.) The Defendant also informed the Plaintiff at that time that he would be given a hearing on the matter in order to present any reasons why he should not be transferred and that written notice of such a hearing would follow on the next day. (Appendix p. 113, Transcript p. 116.)

The following morning, March 12, 1974, the Plaintiff requested and received permission to telephone legal counsel. He called two lawyers and finally succeeded in reaching and speaking with Attorney Edward Kiel of Springfield, Vermont. (Appendix p. 114, Transcript p. 23.) The same morning of the 12th, Defendant Moeykens personally gave Plaintiff written notice of the hearing which was to be held on March 13, 1974. (Appendix p. 114, Transcript pp. 144-145.) That notice, in addition to telling the Plaintiff the reasons why his transfer was contemplated, advised that Plaintiff could request the presence of relevant witness, make any statements he wished, ask any relevant questions and be assisted by a staff member of his choice. A request for staff assistance and/or witnesses was required to be submitted to the Warden. (Appendix pp. 67-68.) On the advice of his attorney, Plaintiff did not sign this written notice indicating that he wished a hearing and did not designate whether he desired staff representation nor did he identify any witnesses. (Appendix p. 114, Transcript. p. 23.)

On March 13, the hearing was held as scheduled. (Appendix p. 114, Transcript p. 25.) The hearing was recorded and transcribed. (Appendix pp. 69-78.) It was carried out in accordance with guidelines established in a decision of the United States District Court for the District of Vermont, which guidelines

had been codified in Department regulations since February, 1973. (Appendix pp. 102-104, 115, 134.) Defendant Moeykens had coordinated past interstate transfer matters and had, on the presentation of a valid reason against transfer, recommended that such transfer not be carried out. (Transcript pp. 172-173.) Moeykens testified that if Carlson presented any good reasons against transfer, they would be reflected in his decision with a recommendation that no transfer occur. (Transcript pp. 146-148.) The hearing provided the Plaintiff an opportunity to state reasons why he should not be transferred, but he presented none other than to state he protested his transfer and would not mind being sent to the Canadian authorities. (Appendix pp. 67-68, 115.) Shortly thereafter, Plaintiff was given a written decision prepared by Defendant Moeykens recommending that the proposed transfer be carried out. (Appendix pp. 80-81, 115.) Plaintiff was transferred to Lewisburg Federal Prison on March 14th. (Appendix p. 116.)

While at Windsor State Prison, the Plaintiff had since August, 1973 been housed in "A" Block, the administrative segregation area of the facility. (Transcript p. 79.) In "A" Block, Plaintiff was locked in his cell 18 hours a day and was not permitted access to the others areas of the institution or the programs or classes held there. (Transcript pp. 80-82.)

He was restricted entirely to his cell and the tier or corridor in front of his cell except for periodic visits to the "A" Block exercise yard. (Transcript p. 82.) There is every indication that had Plaintiff remained in Vermont, he would have remained in this segregated confinement. (Transcript p. 263.)

At Lewisburg, Plaintiff was held in the administrative segregation area for five days and then moved to the Administration and Orientation Unit (A & O). (Transcript p. 213.) In the A & O Unit there was virtually no restriction on his movement within the institution and he was capable of availing himself of essentially the same privileges as the general population. (Appendix p. 117, Transcript p. 213.) About a month after first arriving at Lewisburg Plaintiff was housed in "A" Block which was considered a part of the general population. (Transcript p. 214.) The extensive federal facilities which Plaintiff was permitted to enjoy included sports activities in the yard, the law library, the general library, movies in the auditorium, the game recreation area, arts and crafts, television, the visiting room, the educational and vocational programs in several fields. (Appendix p. 117, Transcript pp. 211, 218-221.)

At Lewisburg, Plaintiff had several jobs, working in the prison kitchen prior to classification and later in the assembly line of the prison industries. (Appendix p. 117, Transcript p. 85.)

He was paid 23 cents an hour. (Transcript p. 85.) Plaintiff had not held any paying jobs in Vermont. (Transcript p. 85.) Shortly after his arrival, Plaintiff had demonstrated some interest in the draftsman program. However, when he failed to secure immediate placement therein because of lack of openings, he thereafter demonstrated virtually no effort towards becoming involved in any sort of self-improvement program. (Appendix p. 117, Transcript p. 229.) For refusing to work on one occasion, he was placed in punitive segregation. (Appendix p. 117, Transcript p. 92.)

Because of his lack of interest in any of Lewisburg's programs, as well as his record of escapes, Plaintiff was transferred to the United States Penitentiary at Marion, Illinois on July 5, 1974 with a thirteen day holdover at the Terre Haute Federal facility. (Appendix p. 118, Transcript pp. 228-229, 252.) There were no programs engaged in by the Plaintiff at Lewisburg that he could not pick up at Marion. (Transcript p. 251.) At Marion, Plaintiff requested protective custody because of his fear that state prisoners were treated badly by Federal inmates. (Appendix p. 118, Transcript pp. 102-103.) He was moved to the Punitive and Administrative Detention Area of the Marion facility as a result of his request. (Appendix p. 118, Transcript p. 103.)

Plaintiff was permitted unlimited and uncensored correspondence with counsel in the Federal prison system. (Transcript pp. 230-231.) He was also permitted unlimited correspondence with all others, the only exception being inmates in other institutions unless they were family members or co-defendants in a criminal prosecution. (Transcript p. 230.) At one time however he was restricted from corresponding with one young woman at the request of her husband. (Transcript pp. 94, 231.)

Visitation rules at Lewisburg were more liberal than those in Vermont. (Appendix p. 118, Transcript p. 225.) The only person restricted from Plaintiff's visiting list at Lewisburg was a woman who had been convicted of aiding and abetting him in one of his escapes. (Transcript p. 227.) Plaintiff's common law wife lives in Canada. (Transcript p. 84.) She never visited him in Vermont. (Transcript p. 103.) She did, however, visit him once at Marion. (Appendix p. 118.) Plaintiff has no family in Vermont and never received any visits from them while incarcerated there or in the Federal system. (Appendix p. 118, Transcript pp. 84, 103.)

The trial court found no evidence to suggest that the Plaintiff's applicable records had not been transferred to Lewisburg with him. (Appendix p. 119.) The correctional treatment specialist (case manager) in charge of Plaintiff's case at Lewisburg

in fact believed he had all the required information necessary to manage the case. (Transcript pp. 215-216.) There was also no indication that Plaintiff made any claim to anyone at Lewisburg or the Vermont State Prison concerning any personal property allegedly lost in being transferred from Vermont. (Appendix p. 119, Transcript pp. 229-230.)

Plaintiff will not be eligible for parole until April 7, 1978. (Transcript p. 264.) The Deputy Commissioner of Corrections for Vermont testified that incarceration outside of Vermont would not, in any case, impede Plaintiff's consideration for parole. (Transcript p. 265.)

The trial court did find that fewer social telephone calls were permitted at Lewisburg than at Windsor. (Appendix p. 118.)

IV. THE HEARING PROCEDURE PROVIDED PLAINTIFF, WITH THE WARDEN ACTING AS HEARING OFFICER, DID NOT VIOLATE DUE PROCESS.

A. Little, If Any, Due Process Was Required Because No Substantial Loss Was Suffered.

It is well-established that the administration of state correctional facilities is the function of state prison authorities and Federal courts intervene only in the face of a clear showing of constitutional deprivations. Johnson v. Avery, 393 U.S. 483 (1968); Vita v. Cage, 385 F.2d 408 (6th Cir. 1967). Given this administrative discretion, whether any procedural protections

are due in a particular instance depends on the extent to which an inmate will be "condemned to suffer grievous loss". Morrissey v. Brewer, 408 U.S. 471, 481 (1971), quoting Joint Anti-Fascist Refugees Committee v. McGrath, 341 U.S. 168 (1951) (Frankfurter, J., concurring).

The trial court found on the facts of this case that the "plaintiff has suffered but little, if at all, by reason of his transfer from Windsor to Lewisburg." (Appendix p. 124.) Plaintiff does not contest the finding of the trial court that more programs and activities along with greater freedom of movement were available to him in the Federal system than at Windsor. Brief for Appellant at 10. He argues, however, that certain allegations, including loss of visits, threats to his well-being, mail restrictions, and counsel access, were improperly deemed by the trial court not to constitute a substantial loss. Brief for Appellant at 10.

Initially, it must be pointed out that each of these alleged deprivations suffered by the Plaintiff was supported at trial only by the bald assertion of the Plaintiff himself. Brief for Appellant at 9-10. It is well-established that the credibility of witnesses and the weight and value accorded their testimony are for the trier of fact and are not upset on appellate review unless clearly erroneous or without substantial

evidence on the whole record. NLRB v. So. Transport, Inc., 355 F.2d 978 (8th Cir, 1966.) Plaintiff's credibility must be considered a matter of some dispute in view of his repeated inaccurate statements under oath. (Transcript pp. 60-68.) For example, in his original complaint, the Plaintiff swore that he had received no notice whatsoever of the transfer hearing, but his amended complaint asserts that prior notice was given to him both orally on March 11, 1973 and in written form on March 12th. (Appendix pp. 3, 5, 38.)

The Defendants, on the other hand, presented substantial evidence at trial to rebut each of Plaintiff's bald assertions of loss and justify the trial court's finding.

(1) Loss of visits. At trial, Plaintiff admitted that he has no family in Vermont and that none of his family ever visited him there. (Transcript pp. 84, 103.) His wife is a Canadian resident who has visited him more times since he was transferred, namely once, than while he was incarcerated in Vermont. (Transcript pp. 38, 84, 103.) The only visits Plaintiff received at Windsor were from friends at the community correctional center and it is reasonable, if not likely, that the Plaintiff will just as easily make acquaintances in the Federal system as he did in Vermont. (Transcript p. 103.) At Lewisburg, no one was prevented from visiting Plaintiff

except a former accomplice in one of his escapes. (Transcript p. 227.) In fact, visitation rights, in general, including times and days permissible, were more extensive at Lewisburg than at Windsor. (Transcript p. 225, Appendix p. 118.)

(2) Mail restrictions. In the Federal system, Plaintiff does have to submit the names of proposed correspondents, but his counselor pointed out at trial that there are virtually no restrictions on who is approved, with the exception of inmates at other institutions unless they are co-defendants. (Transcript p. 230.) The only individual whom the Plaintiff was actually prevented from writing to was one young woman at the request of her husband. (Transcript pp. 94, 231.)

(3) Access to counsel. Plaintiff testified that he did not see his Vermont counsel at Lewisburg, but no evidence was introduced that any personal visits had been necessary or that any harm was suffered as a result. Plaintiff's counselor at Lewisburg testified that there were no restrictions whatsoever on mail correspondence with counsel. (Transcript pp. 230, 252.) Plaintiff presented no evidence that such correspondence was not adequate for his purposes.

(4) Threats to his well-being. Plaintiff's claim of physical peril requiring protective custody because he was a state prisoner in the Federal system occurred only after transfer to another

Federal facility and he in fact requested this custody. (Transcript pp. 102-103.) The reasons leading to the request for protective custody after Plaintiff left Lewisburg could be for any number of reasons, including actions that Plaintiff himself might have taken and surely such a change of circumstances could not reasonably be anticipated by the Defendants. It is interesting to note the Plaintiff was not physically threatened at Lewisburg or at least no evidence to this effect was introduced. Mr. Gilliland, his counselor, testified that he knew of no such animosity born against state prisoners in the Federal system. (Transcript pp. 254-255.)

Plaintiff at pages 9-10 of his brief, also urges, but less strongly, several other areas of alleged deprivation that he maintains the trial court should have deemed substantial. Again, the evidence adduced at trial clearly supported the trial court's finding that little if any loss had been suffered.

(5) Loss of personal property. No proof of the loss of such property or of any attempts to recover it, except as found in Plaintiff's own testimony, was introduced at trial. Plaintiff's counselor at Lewisburg testified that no claim concerning any lost property was made to him or, to his knowledge, to any other personnel at Lewisburg. (Transcript pp. 229-230.) If there was such a loss, and, in any case, if it was substantial, it seems

unreasonable that Plaintiff would not have mentioned it to prison personnel themselves instead of writing the Canadian Consulate or merely informing his attorney. (Transcript p. 77.) The trial court rightly concluded that the evidence failed to indicate that the Plaintiff had experienced any hardship over the loss. (Appendix p. 123.)

(6) Social phone calls. Though there was evidence that fewer social phone calls were permitted at Lewisburg, no evidence was introduced to show that the Plaintiff had ever made use of the phone for social purposes at either institution or that the Federal policy restricted the normal phone use to which the Plaintiff had become accustomed at Windsor. (Transcript pp. 38-40, Appendix p. 123.)

(7) Erroneous records. This claim translates into Plaintiff's averment that at a meeting with the classification committee at Lewisburg, his opinion of his sentence length differed from theirs and the difference was to his advantage. (Transcript p. 100.) Plaintiff then admitted that he himself had never seen the files that he claimed were erroneous and no erroneous or incomplete files were introduced into evidence. (Transcript p. 100.) On the other hand, Plaintiff's counselor at Lewisburg testified that in his opinion the files that accompanied Plaintiff from Windsor were complete and contained

all the materials necessary for managing Plaintiff's case. (Transcript pp. 215-216.)

(8) Treated as Federal prisoner. No evidence whatsoever was introduced showing that there was any differences in being treated as a Federal prisoner other than those already discussed above or that any harm had or would visit the Plaintiff as a result.

(9) Restricted personal grooming. Defendants have been unable to locate any evidence, including Plaintiff's own testimony, discussing this point.

It seems clear then in view of the evidence presented at trial concerning these specific alleged deprivations suffered by the Plaintiff that little if any actual deprivation was incurred as a result of transfer. Furthermore, as noted above, Plaintiff admits that greater freedom of movement and program opportunites were available to him in the Federal system than in Vermont. In conjunction, these two facts lead to the inescapable conclusion that, if anything, Plaintiff has been benefited rather than deprived as a result of transfer. Certainly the trial court's conclusion that transfer resulted in little if any loss to the Plaintiff is justified by the evidence. Furthermore, such a conclusion, reasonably flowing as it does from the basic facts as found (Appendix pp. 116-119), is

itself an ultimate fact whose determination should not be disturbed on appellate review. See, e.g., Around the World Shoppers Club v. U.S., 309 F.2d 324 (3rd Cir. 1962).

Given then that no loss, certainly no grievous loss, was suffered by the Plaintiff as a result of transfer, arguably he was not entitled to any due process hearing. Cf. Morrissey v. Brewer, supra at 481. As the Supreme Court has recently noted, "the Due Process Clause does not require a hearing 'in every conceivable case of government impairment of private interest'." Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 2975, 41 L.Ed. 2d 935, 951 (1974) quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 894, 81 S. Ct. 1743, 1748, 6 L.Ed 2d 1230 (1961). Here the impairment to the Plaintiff's interests as found by the trial court and justified by the evidence presented was minimal if not nonexistent. In such a situation, procedural protection need not attach. See U.S. ex rel Haymes v. Montanye, 505 F.2d 977 (2nd Cir. 1974) (semble), cert. granted, 95 S. Ct. 2676 (1975) (No. 74-520).

The Plaintiff, however, cites several cases for the proposition that involuntary interstate transfer does require

procedural due process because of the loss involved.[2] Brief for Appellants at 12. But where, as here, no loss has been shown to be involved, the rationale of such holdings is inapposite.

Almost all the cases cited by the Plaintiff mandated due process only upon a finding that, in the particular circumstances involved, a substantial loss had been incurred as a result of transfer. For example, in Ault v. Holmes, 369 F. Supp. 288 (W.D. Ky. 1973), vacated in part and remanded, 506 F.2d 288 (6th Cir. 1974), the hearing requirement was restricted to inmates who were residents of Kentucky because the losses found on the facts therein related to distance from one's home state and the ties and contacts long-established there. In Stone v. Egeler, 377 F. Supp. 115 (W.D. Mich. 1974), aff'd and modified, 506 F.2d 287 (6th Cir. 1974), the court found that the intrastate transfer of an inmate would nonetheless severely impair visits from his family and disrupt his college program and therefore mandated that some due process must attach.

[2] Stone v. Egeler, 377 F. Supp. 115 (W.D. Mich. 1974) cited in support of this proposition actually involved an intrastate transfer. The Defendants are aware, however, and this court has pointed out that classification of transfers as "inter" or "intra" are meaningless where deprivations are "as a practical matter, equally severe." Newkirk v. Butler, 499 F.2d 1214, 1218 (2nd Cir. 1974), vacated and remanded with directions that the complaint be dismissed as moot by the District Court sub nom. Preiser v. Newkirk, ___ U.S. ___, 95 S. Ct. 2313, ___ L.Ed. ___ (1975).

Similar in the requirement that a substantial loss be found on the facts of the particular transfer are most other cases cited by the Plaintiff. Croom v. Manson, 367 F.Supp. 586 (D. Conn. 1973) (deprivation of familial visitation, lack of access to counsel, disruption of rehabilitative program, change in confinement); Capitan v. Culp, 356 F. Supp. 302 (D. Or, 1973) (2000 mile distance from family and home state); Robbins v. Kleindienst, 383 F.Supp. 239 (D.D.C. 1974) (stricter security confinement); Clonce v. Richardson, 379 F.Supp. 239 (W.D. Mo. 1974) (behavior modification program restricting movement and imposing attitude control); Walker v. Hughes, 376 F. Supp. 708 (E.D. Mich. 1974), further opinion, 386 F. Supp. 32 (E.D. Mich. 1974) (change in confinement from medium security to maximum security facility with long-term adult offenders). In the case at bar, however, the trial judge could not find on the facts that this particular Plaintiff had or would suffer substantial loss as a result of transfer. On this ground, the foregoing cases cited by the Plaintiff as requiring due process in an involuntary interstate transfer are inapposite.

In essentially only one of the cases relating to interstate transfer cited by the Plaintiff,[3] it is argued that such

[3] Kessler v. Culp, 372 F. Supp. 76 (D. Or, 1973) supports this proposition to the extent that it relies on Gomes v. Travisono, infra.

transfer inherently entails grievous loss and therefore that due process attaches in every transfer situation. Gomes v. Travisono, 490 F.2d 1209 (1st Cir. 1973), vacated and remanded for further consideration in light of Wolff v. McDonnell, 418 U.S. 909 (1974), ___ U.S. ___, 94 S. Ct. 3200, 41 L.Ed. 2d 1155 (1974), modified, 510 F. 2d 538 (1st Cir. 1974). Despite the sweeping statement contained therein concerning a per se loss incumbent on transfer (see Brief for Appellant at 11), it is interesting to note that a substantial loss to those plaintiffs, including failure to transfer files, disruption of prior treatment programs, fewer visits from family and friends, was found on the specific facts of the case. Gomes v. Travisono, supra at 1213. Therefore, even including Gomes, no case cited by the Plaintiff has held that due process attaches to transfer where, on the facts of that case, no substantial loss was found to be suffered by the particular inmate or inmates involved.

Furthermore, the rationale for this general proposition as articulated by the First Circuit and reprinted on page 11 of Appellant's Brief does not apply to the facts of the instant case. It has been determined by the trial court here and supported by the evidence that Plaintiff has not suffered any substantial loss of visits or experienced any difficult in communication because he is no longer incarcerated in Vermont,

a state which is not his home and with which he has no established ties. (Appendix pp. 118, 122-123.) No established educational or rehabilitative programs were broken off by reason of his transfer. (Appendix pp. 117, 122.) In fact, only since his transfer has the Plaintiff been involved in any substantial rehabilitative programs available to the general population. (Appendix pp. 117, 122.) It is true that Plaintiff was housed in administrative segregation for five days after transfer, but such conditions were essentially the same as those under which he had been confined in Vermont and under which he would have remained had he not been transferred. (Appendix p. 123.) After five days of segregation, Plaintiff had substantially free run of the entire Lewisburg facility. (Appendix pp. 117, 122.) Finally, neither unfavorable parole nor disciplinary consequences were found attendant on transfer in this case. (Appendix p. 123.) On such findings of fact, the general rule articulated in Gomes v. Travisono, supra, that due process attaches to every transfer because transfer inherently entails grievous loss loses the underlying rationale from which it originates.

This court has in fact specifically declined to adopt the per se rule of the First Circuit. In Newkirk v. Butler, supra at 1218, the court pointed out that, at that date, it had not yet reached the question of whether transfer inherently involved substantial loss so as to always mandate some due process:

> "Since his /the plaintiff's/ right to minimum due process is clear in the circumstances of this case, it becomes unnecessary for us to decide whether some form of due process is required in the case of every transfer of a prisoner. See Gomes v. Travisono, supra at pp. 1213-1214."

However in U.S. ex rel Haymes v. Montanye, supra, decided four months later, this court implicitly declined to follow the Gomes rule. There an inmate alleged that his summary transfer to a different institution within New York state denied him due process of law. The trial court granted summary judgment against the inmate and this court reversed arguing that there was a genuine issue of fact as to whether the transfer was punitive in nature and therefore required a hearing. In so doing, this court took notice of the possible deprivations attendant upon transfer, supra at 981-892, but declined to rule that every transfer would necessarily involve such deprivations. The court recognized that "the hardship involved in the mere fact of dislocation may be sufficient to render ... summary transfer -- if a trial establishes that it was punitive -- a denial of due process" (supra at 981), but pointed out that such a claim

> "would not merit relief absent a showing that the move to the Clinton Correctional Facility in fact had consequences sufficiently adverse to be properly characterized as punitive." (Supra at 981) (emphasis supplied.)

Thus, this court, while admitting that the dislocation involved in transfer might satisfy the grievous loss threshold that

mandates due process, has made it clear that the particular inmate involved must show at trial that as to him such dislocation has in fact resulted in loss. In contrast to the First Circuit and in accordance with Justice Holmes' dictum the "generalizations do not decide concrete cases", Lochner v. N.Y., 198 U.S. 45, (1905) (Holmes, J., dissenting) this court has in essence ruled that due process attaches to a transfer only where the particular individual involved suffers a substantial loss.

The trial court found no substantial loss to the Plaintiff as a result of transfer based on the facts of this case. (Appendix p. 124.) Patently, no due process was required.

B. Assuming Arguendo That Some Due Process Was Required, The Hearing Afforded the Plaintiff, with the Warden Acting as Hearing Officer, Was Constitutionally Satisfactory.

Despite the lack of loss to be suffered by Plaintiff, the State of Vermont provided him with a panoply of procedural protections prior to transfer. He was given oral notice of the scheduled transfer hearing which was followed the next day by written confirmation. The written notice stated the reasons for his proposed transfer and outlined an opportunity for him to call witnesses and to be assisted by lay counsel. A hearing

was held the following day before a decision-maker who had power to influence the tentative transfer decision. At the hearing the Plaintiff was invited to present reasons why he should not be transferred and the proceedings were recorded on tape and subsequently transcribed. Shortly thereafter and prior to transfer written findings were given to the Plaintiff. (See Appendix pp. 113-115.)

The trial court found, on this set of facts, that Plaintiff had not been denied due process of law in being transferred to the Federal prison system. (Appendix p. 129). The Plaintiff agrees that these procedures are constitutionally adequate in all respects, except as to the identity of the hearing officer whose partiality, it is claimed abrogated due process guarantees. Brief for Appellants at 19. The Defendants contend that the hearing officer in this instance, the warden, was as impartial as due process required.

1. The warden was sufficiently impartial to satisy the due process standards of Wolff v. McDonnell.

As the trial court pointed out, the Plaintiff's allegation as to the non-neutrality of the warden breaks down into two contentions: (1) that the warden felt a personal antipathy for the Plaintiff and (2) that he was too involved with the facts of Plaintiff's case prior to the hearing to render an objective

decision. (Appendix p. 126.) The court examined both of these contentions and found them to be without merit. The evidence more than justifies such a conclusion.

There was no credible evidence introduced at trial that would show a personal bias that prevented the warden from acting in a proper manner at the transfer hearing. The warden denied that any heated exchange had occurred between himself and the Plaintiff when the former came to deliver oral notice of the proposed transfer hearing. (Transcript pp. 156-158.) Employees who were present on both March 11th and 12th also denied that any such heated exchanges had occurred. (Transcript pp. 278, 281-283, 289-290). Allegations as to prior arguments between the two men were supported only by the testimony of the Plaintiff himself. Latitude must be granted in accepting such testimony given the necessarily adverse roles of a warden and inmate in a prison situation. Anthony Tanzi, who participated with Plaintiff in the March 11th escape, testified at one point that the Plaintiff was treated no differently by the warden than any other inmate. (Transcript p. 123.) And the trial court rightly pointed out that in a small institution such as Windsor, a superintendent must necessarily become personally acquainted with those under his supervision and interact with them. (Appendix p. 127.)

The warden admitted that he had on occasion called the state's attorney with regard to notifying the latter of possible criminal charges to be brought against the Plaintiff and further admitted that he had on one occasion testified against the Plaintiff in a criminal proceeding. Surely, however, such actions are part of a warden's legitimate duties and would be directed against any inmate similarly situated. (Transcript p. 132.) Plaintiff makes much of an incident sometime before relating to the warden closing down of an administrative hearing involving Plaintiff. This occurred because of clear violations of the Department's policy on the involvement of legal counsel at such hearings. The action taken by the warden was held to be entirely proper under the circumstances and was done on the advice of counsel. (Appendix p. 127, Transcript pp. 177-178, 180.)

The warden on the other hand, testified to no bias against or dislike of the Plaintiff and in fact considered him a model prisoner except for his escape propensity. (Transcript pp. 173-174.) He testified that if Plaintiff had given him a valid reason why transfer should not be effected it would have been given due consideration. (Transcript pp. 146-148.) Both the transcript of the hearing and the testimony of Department superiors indicate that the warden's recommendation would have carried great weight in the final transfer decision. (Appendix

pp. 69-79, Transcript pp. 269-271.) Most important of all, as the trial court pointed out, there was no evidence whatsoever that Plaintiff's transfer was in any way motivated by the warden's bias or dislike. (Appendix p. 127.)

In essence, the warden's attitude toward the Plaintiff was typical of the attitude the warden of any small correctional facility would have toward an inmate under his charge. Events and the size of the institution had caused the two to interact perhaps more extensively than is usual but such interaction was always in the context of the structured warden-prisoner relationship. No case has held that a prison administrator is per se precluded from acting as hearing officer. In Wolff v. McDonnell, supra, for example, the court adjudged a disciplinary committee entirely composed of prison administrators, including the deputy warden for custody, as constitutionally satisfactory. See also Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974), modified, 510 F.2d 613 (9th Cir. 1975.) Given the essentially traditional inmate-warden relationship manifested in the present case, holding that the warden was too biased to be impartial would be tantamount to flatly excluding prison administrators from hearing boards. On this set of facts, it cannot be held that the warden's attitude toward the Plaintiff was so prejudicial an objective hearing.

Plaintiff's second contention that the warden was too involved with the tentative decision to transfer to remain impartial is pressed more strongly. Plaintiff emphasizes and urges as dispositive that the warden pursuant to an order of the Commissioner of Corrections, conducted an investigation into the facts surrounding the escape prior to the transfer hearing. See Brief for Appellant at 19. The Defendants contend that such an investigation did not in this case render the warden insufficently impartial to satisfy the Due Process Clause in light of Wolff v. McDonnell, supra.

The Defendants agree that a due process hearing, where one is required, implies an impartial or "relatively impartial"[4] decision-maker. Wolff v. McDonnell, supra, mandates impartiality in a prison disciplinary hearing. But nowhere in Wolff itself is impartiality equated with an absence of investigative participation. Nowhere is the decision-maker's involvement with the investigative process declared to be constitutionally impermissible. In fact, the court specifically noted that the Nebraska Adjustment Committee was directed, among other things, to "conduct investigation". Wolff v. McDonnell, 94 S. Ct. at 2972.

[4] Newkirk v. Butler, 364 F. Supp. 497, 503 (S.D. N.Y. 1973).

The Defendants contend that it makes little difference that, on the facts as found in Wolff, the Committee chose to delegate this investigative function to the Chief Corrections Officer, instead of conducting the investigation themselves. Whether the hearing officer is informed as to the facts of a case by a report submitted to him by a third party or discovers those facts himself is a procedural distinction with little effect on the pre-disposition with which he enters the hearing. In either situation, the decision-maker enters the hearing with only a preliminary orientation. Had the court in Wolff objected to the making of any preliminary investigations so that the attitude of the hearing officer at the hearing was totally devoid of any preconceptions concerning the case, Plaintiff's contention might have merit. But where preliminary investigations are in fact condoned, as in Wolff, there is but little substantive difference should the hearing officer decide to conduct the investigation himself.

Support for Plaintiff's contention and for the Ninth Circuit's assertion (Clutchette v. Procunier, supra at 810) that investigative participation precludes impartiality in the decision-maker derives not from Wolff itself, but from Justice Marshall's dissent therein and from Morrissey v. Brewer, supra, from which his dissent proceeds. The Defendants contend that

reliance on Marshall's dissent is misplaced. They contend that the thrust of the Wolff decision is the Supreme Court's recognition of the necessarily broad brush with which prison administrators must be allowed to paint and it's rejection of strict procedural equations such as Marshall's belief that investigative participation precludes impartiality.

It is apparent in Wolff that the court seeks to distinguish Morrissey v. Brewer, supra, not as to a lesser individual interest involved in a prison disciplinary proceeding but as to the environment in which the proceeding takes place and per-force the greater state interest present:

> "Prison disciplinary proceedings, on the other hand, take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life.
>
> 94 S. Ct. at 2977.

> "Perhaps as the problems of penal institutions change and correctional goals reshaped, the balance of interests involved will require otherwise. But in the current environment, where prison disruption remains a serious concern to administrators, we cannot ignore the desire and effort of many States ... to avoid situations that may trigger deep emotions and that may scuttle the disciplinary process as a rehabilitation vehicle."
>
> 94 S. Ct. at 2980.

Essential to the court's understanding of the state interest involved was an awareness of the broad spectrum of human attitudes and activities presented in a correctional institution. The court pointed to the vagaries of inmate conduct as suggesting the need for broad administrative discretion and procedural flexibility in the penal setting:

> "Inevitably there is a great range of personality and character among those who have transgressed the criminal law. Some are more amenable to suggestion and persuasion than others. Some may be incorrigible and would merely disrupt and exploit the disciplinary process for their own ends. With some, rehabilitation may be best achieved by simulating procedures of a free society to the maximum possible extend; but with others it may be essential that discipline be swift and sure. In any event, it is argued, there would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straight-jacket ..."
>
> 94 S. Ct. at 2978.

In determining what procedural protections attached in a prison disciplinary situation, the court adopted this analysis and declined to make hard and fast rules concerning the right to call witnesses, the right to confrontation and cross-examination, and the right to legal counsel, emphasizing at several junctures that "we should not be too ready to exercise oversight and put aside the judgment of prison administrators." 94 S. Ct. at 2979. Certain procedures concerning notice and findings were felt to be manifestly required by due process and therefore suited to blanket-formulations, but pervading Wolff is an aversion

to black letter rules and a deference to administrative discretion. The thrust of the decision is that, in a penal setting, "there is much play in the joints of the Due Process Clause". 94 S. Ct. at 2980.

The Defendants thus contend that Justice Marshall's equation of investigation with partiality is precisely the kind of blanket-formulation that a majority of the court in Wolff felt to be inapposite in the penal context. Admittedly such an equation was articulated by the court in Morrissey v. Brewer, 92 S. Ct. at 2602, but hard and fast rules are suited where

> "the procedures by which it is determined whether the conditions of parole have been breached do not themselves threaten other important state interests, parole officers, the police or witnesses, at least no more so than in the case of the ordinary criminal trial."
>
> 94 S. Ct. at 2977.

It is not submitted that investigative participation on the part of the hearing officer can never destroy impartiality. Nor is it argued that the determination of whether such participation renders a hearing officer non-neutral is within the province of administrative discretion. It is argued in light of Wolff that no automatic equation of investigation with partiality need be applied. In some cases investigative involvement may destroy neutrality, in others not. Support for such a proposition can be found in the Wolff court's indication that a defined

area of discretion may affect an otherwise dubiously impartial hearing officer. 94 S. Ct. at 2981.

On the facts of this case, the warden's involvement prior to the transfer hearing did not render him impermissibly impartial. The trial court found that it did not appear that the warden had played "any significant part in the initial stages other than to report that Carlson had escaped again on March 11th and to indicate that he was aware of the security risk that Carlson's presence presented to the institution." (Appendix p. 129.)

Be that as it may, the particular circumstances of this case render the warden a sufficiently impartial tribunal. First, it should be pointed out, as shown above, that there was little if any loss to the Plaintiff incumbent upon transfer. Wolff recognized that "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginative situation." 94 S. Ct. at 2977. Where little if any loss is involved, the flexible due process advocated by Wolff allows for some relaxation in the impartiality of the decision-maker.

Second, the warden was not acting with unlimited discretion. As the trial court noted, "the discretion to transfer a prisoner is carefully regulated by the criteria for transfer set out in the Department of Corrections bulletin covering out of state transfers." (Appendix p. 129. 102-104.) This policy was carried

out in Plaintiff's case. (Transcript pp. 260-263.) The court in Wolff pointed favorably to a similar restraint on the discretion of the Adjustment Committee and suggested that restraints on discretion mitigate against requiring absolute impartiality.

Third, this was a transfer hearing. Wolff involved a disciplinary proceeding. In discussing why legal counsel should not be required in such a disciplinary proceeding, the Wolff court cited the rationale of Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L.Ed. 2d 656 (1973), and pointed out that "the problem as outlined in Scarpelli with respect to parole and probation revocation is even more pertinent here." 94 S. Ct. at 2981. Wolff thus recognized that in different proceedings a different balancing of the interests involved may be required. In a transfer situation access to the ultimate decision-maker is often more important than absolute impartiality. See Gomes v. Travisono, supra at 1216. Plaintiff's ability in this case to directly address the decision-maker offsets any shortcomings the warden may have had as regards neutrality.

In summary then, despite whatever impartiality, if any, the warden lacked whether because of personal bias against the Plaintiff or because of involvement with the case, he was sufficiently neutral under the rationale of Wolff v. McDonnell, supra to satisfy the Due Process Clause.

2. The warden was clearly a constitutionally satisfactory hearing officer under the law as it existed at the time of transfer.

Plaintiff's transfer hearing was held on March 13th, 1974. Wolff v. McDonnell, supra was not decided until June 26th of that same year and it's requirements were not retroactive in effect. 94 S. Ct. at 2983. The applicable case law at the time of Plaintiff's transfer consisted essentially of two cases: Gomes v. Travisono, supra, and Bousley & Messier v. Stoneman, Civil No. 6679 (D. Vt. June 13, 1973). Bousley & Messier v. Stoneman, supra, decided in the Federal District Court for Vermont was the controlling case law. In that case the court held in part that

> "A plaintiff whose transfer is proposed shall be entitled, except in case of emergency, to advance written notice of the proposed transfer and right to hearing before transfer. In case of emergency a hearing before an appropriate person or body shall be afforded promptly after transfer." (emphasis supplied).

No requirement of a neutral and detached decision-maker was specified. The court instead chose to emphasize that the hearing officer be "appropriate". Presumptively, the warden satisfied this standard.

In Gomes v. Travisono, supra at 1215, decided in the First Circuit, the inmate to be transferred was entitled, among other things, to "a personal hearing before a decision-maker". Again no requirement as to the impartiality of the hearing officer was specified. Presumptively, the warden satisfied the standard articulated.

C. Any Error In The Trial Court's Conclusion As To The Warden's Impartiality Is Harmless.

On the facts of this case, no hearing officer, no matter how impartial, would not have concurred in the decision to transfer the Plaintiff. This theory is advanced for three reasons: First, the transcript of the hearing reveals that Plaintiff presented no reasons whatsoever for not being transferred. Nor was any evidence or testimony introduced. Given this utter lack of content in the hearing, there was nothing upon which an impartial mind could pass judgment. No matter who was sitting where the warden sat, the Plaintiff would have been transferred. Second, no factual matter could have been raised which required an impartial determination. The facts concerning Plaintiff's many escapes were not in dispute and Plaintiff admitted as much. Given that at trial Plaintiff admitted to all of the escapes including that of March 11th, 1974, he failed to raise there any issue on which he could claim that a more impartial hearing officer would have ruled differently. Third, the trial court noted that "considering the evidence presented at trial which established what a grave threat Plaintiff's escape activities posed to the security of the institution, we note that it is extremely doubtful that the testimony of witnesses or that representation by staff counsel would have altered the outcome of the hearing." (Appendix p. 125.) Similarly, assuming that

some factual issue was or could have been raised by the Plaintiff at the hearing, the de facto inability of the State of vermont to keep the Plaintiff behind the walls of its correctional facilities makes it extremely implausible, if not impossible to imagine any hearing officer coming to a different decision than that arrived at by the warden himself.

Since the Plaintiff would have been transferred no matter who the decision-maker was, any error in the trial court's conclusion as to the impartiality of the warden is harmless and offers no ground for disturbing the trial court's order. Fed. R. Civ. Pro. 61. Rule 61, as its language indicates, applies to conclusions of law. Midland Valley R. Co. v. Railway Express Agency, Inc., 105 F.2d 201 (10th Cir. 1939). It has been held to apply to errors of constitutional dimension as well. Chapman v. California, 386 U.S. 18, 87 S. Ct. 524, 17 L. Ed. 2d 705 (1967).

V. PLAINTIFF WAS NOT DENIED EQUAL PROTECTION OF THE LAW IN NOT BEING AFFORDED LEGAL COUNSEL AND A HEARING OFFICER OTHER THAN THE WARDEN IN HIS TRANSFER HEARING

A. No Equal Protection Problem Has Been Raised.

Plaintiff claims that not providing him legal counsel and a hearing officer other than the warden in a transfer hearing relating to activity for which he was exposed to criminal prosecution, while affording legal counsel and a hearing officer other than

the warden to another inmate in a disciplinary hearing relating to the same activity and for which the latter was similarly exposed deprived the Plaintiff of equal protection of the law. It is well-established that equal protection of law only means that the same protection and security will be given to individuals under like circumstances. E.g. Sovereign Camp W.O.W. v. Casados, 21 F.Supp. 989 (D.N.M. 1950). The Defendants contend that the Plaintiff and the inmate who was proceeded against disciplinarily were not similarly situated and that therefore no equal protection claim exists.

Plaintiff contends that the same action by him, namely the escape of March 11th, as that by inmate Tanzi resulted in different types of procedural process and that equal protection has consequently been denied. Brief for Appellant at 20. If this had been the first escape for both men and yet one was transferred and the other disciplined, with different process attaching in each case, Plaintiff's assertion might have some merit. The same would be true if both men had escaped a similar number of times. But the evidence introduced at trial testifies to the fact that they were not similarly situated in this respect. The Plaintiff had escaped on numerous occasions, the March 11th escape being only the last in a long series. (See Statement of Facts). The same was not true of inmate Tanzi. Though the March 11th escape did of itself cause inmate Tanzi to suffer disciplinary punishment, the March 11th escape did not of itself

cause the Plaintiff to be transferred. In the Plaintiff's case, it was his whole history of escape attempts, underscored by the March 11th incident, that caused transfer proceedings to be instituted against him. (See Transcript pp. 260-268.) It raises no equal protection problem for the Department of Corrections to proceed differently, and with different procedural protections where criminal charges are involved, against two individuals who are not similarly situated.

Secondly, any claim by the Plaintiff that he and inmate Tanzi were similarly situated so that the same procedural protections should have attached where criminal charges were a possibility is contingent on a showing that the result of transfer is essentially the same as the result of a disciplinary proceeding. Plaintiff correctly points out that where there is grievous loss, the label given the hearing cannot limit the amount of due process which must be afforded. (Appendix p.65). But the fact that loss might be involved in two situations does not necessarily mean that the same process must be afforded. Compare Morrissey v. Brewer, supra, with Wolff v. McDonnell, supra. And certainly for equal protection purposes, a claim that the same process be afforded in one situation as in another despite the labels involved, demands a showing that for practical purposes the situations should be considered identical.

In no way were the practical effects of the two proceedings in any way identical. Tanzi was disciplined and sentenced to 30 days of solitary confinement and required to start the behavior modification program all over again. (Transcript p. 115.) Plaintiff's transfer on the other hand did not, in the opinion of the trial court, have "consequences sufficiently adverse to be properly characterized as punitive". (Appendix p. 122.) He did not suffer any loss whatsoever as a result of transfer but was benefitted. Where two proceedings point toward such disparate results there is no ground for considering them identical for practical purposes or for deeming the two inmates involved similarly situated.

Furthermore, as the trial court noted, the Defendants had no way of knowing whether charges would in fact be brought against Plaintiff:

> "We only add here that the decision to bring criminal charges was made by the local prosecuting officer, an individual completely independent of the corrections officer and with no influence over the decision to transfer. In the instant case the Plaintiff was not charged immediately by the state's attorney but only upon being returned to Vermont from the federal system in connection with another offense. It is impossible to know whether the Plaintiff ever would have been charged criminally had he remained in the federal system throughout the duration of his sentence. It is entirely possible that the decision to transfer would have ended the matter at that point."
>
> (Appendix p. 146.)

The Defendants had rightful cause to believe that criminal charges would not be pressed against Carlson since he was being removed from the Vermont jurisdiction, but had no such reason for expecting the same with regard to Tanzi who was remaining in state. The Plaintiff and Tanzi, therefore, were not similarly situated in this respect either.

B. Assuming Arguendo That A Classification With Respect To Similarly Situated Individuals Has Been Created, There is a Rationale State Purpose Behind the Classification.

Plaintiff was not afforded legal counsel and a hearing officer other than the warden in a transfer hearing relating to activity for which he was exposed to criminal charges. In a disciplinary hearing relating to activity for which criminal charges could be brought, inmate Tanzi was permitted legal counsel and a hearing officer other than the warden. Assuming that Plaintiff and Tanzi were similarly situated, a showing by the state that there exists a rationale basis for the destination will suffice to render the distinction valid. E.g. McGowan v. Maryland, 336 U.S. 420 (1961).

It is necessary first to consider the different natures of the two proceedings. A disciplinary hearing results from particular activity on the part of the inmate involved. It seeks a factual determination in order to render a verdict of

guilty or innocent. It is best characterized as an adjucative proceeding.[5] See Wolff v. McDonnell, supra.

The decision to transfer an inmate however often results from factors completely extraneous to the inmate's own behavior. As the trial court noted, it often relates to considerations such as overcrowding, health hazards, and protection for the inmate. (Appendix p. 144.) The decision to transfer is normally proposed by the administration and the transfer hearing seeks reasons why the transfer should not be effected rather than the determination of some factual issue. Consequently a transfer hearing is best characterized as discretionary rather than adjucative proceeding. See U.S. ex rel Haymes v. Montanye, supra.

In the transfer situation, devoid as it often is of the need for factual findings, consideration of access to the decision-maker are paramount:

> "The function of the hearing would not be to force the warden to justify his decision by any guarantee of evidence, or to provide the basis for review by a remote independent official, or court. But it would serve the prisoner's interest in not being subjected, without an opportunity to present his views and factual corrections, to an arbitrary decision stemming from the malice of a guard or other prisoner, or an untrue rumor."
>
> Gomes v. Travisono, supra at 1215-1216.

[5] Characterizations of a hearing as disciplinary and administrative, while unhelpful in a due process context (see Newkirk v. Butler, supra). retain validity in an equal protection analysis.

In the disciplinary situation, on the other hand, where characteristically the adjucation of a factual dispute is involved, the impartiality of the fact-finder becomes most important and the need for access to the ultimate decision-maker declines.

Given the disparate natures of the two proceedings, the insertion of legal counsel and an independent hearing officer into these proceedings would necessarily have different results. In Gagnon v. Scarpelli, supra the court considered the effect of introducing legal counsel into a probation revocation proceeding:

> "The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in Morrissey as being 'predictive and discretionary' as well as fact-finding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate other than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State--for appointed counsel, counsel for the State, a longer record and the possibility of judicial review--will not be insubstantial." /Footnote omitted./ 411 U.S., at 787-788.

What was said in Gagnon v. Scarpelli, supra is even more pertinent here in disciplinary and transfer proceedings. In both cases,

the introduction of counsel will rigidify the proceedings and render them more akin to a criminal trial. Where a proceeding is already essentially adjucative in character, however, an intensification of its adjudicative nature will not substantially impair the purposes for which it exists. In fact, in some cases legal counsel might be better able to marshall facts and present evidence therefore increasing the effectiveness of the proceeding itself.

But it has been pointed out that in a transfer hearing in order to have input into the decision to transfer, access to the ultimate decision-maker is required. The introduction of essentially adjucative procedural protections, counsel and independent hearing officers, into that hearing will only cut down on that access which is so necessary to effectuate the essential purpose of the hearing itself.

In both disciplinary and transfer hearings where criminal charges may be brought, the inmate and the state have some interest in seeing counsel and an independent hearing officer introduced. In both cases, unfortunate consequences such as increased costs, prolonged decision-making, and a rigidifying of the procedure itself will result. However, in a disciplinary proceeding already essentially adjucative, the advantages to having counsel where criminal charges are brought outweighs what minimal loss

is incurred. On the other hand, in a transfer hearing the introduction of counseling and hearing officer will chill that access to the decision-maker crucial to the effective operation of that hearing. In the transfer situation therefore the state has determined that the advantages attendant upon introduction of counsel and hearing officer are outweighed by the disadvantages both to the state and to the inmate himself.

C. Any Error In The Trial Court's Conclusion As To A Denial Of Equal Protection Is Harmless.

On the facts of this case, no amount of procedural protections, including legal counsel and an independent hearing officer, would have resulted in the Plaintiff's not being transferred. This theory is advanced for two reasons: First, the facts concerning Plaintiff's many escapes were not in dispute and Plaintiff admitted as much. Given that at trial Plaintiff admitted to all the escapes including that of March 11th, 1974, he failed to raise any issue on which he could claim that because of a lack of counsel he was inhibited from presenting reasons or evidence why he should not be transferred. Second, the trial court noted that "considering the evidence presented at trial which established what a grave threat Plaintiff's escape activities posed to [illegible] security of the institution, we note that it is extremely doubtful that the testimony of witnesses or that representation by staff counsel would have altered the outcome of the hearing." (Appendix p. 125.) Similarly, assuming

that there was some evidence that the Plaintiff could have introduced at the hearing and would have due to the presence of counsel, the de facto inability of the State of [illegible]nt to keep the Plaintiff behind bars makes it diffic[illegible] if [illegible]ot impossible to imagine a different outcome to the hearing.

Since the Plaintiff would have been transferred in any case, any error in the trial court's conclusion as to the need for legal counsel and an independent hearing officer is harmless and offers no ground for disturbing the trial court's order. Fed. R. Civ. Pro. 61. As has been noted above, Rule 61 applies to conclusions of law and to errors of constitutional dimension as well. See Midland Valley R. Co. v. Railway Express Agency, Inc., supra; Chapman v. California, supra.

D. The Issue is Moot.

There must be an actual controversy between parties in order to warrant the exercise of federal judicial power and this controversy must be extant at all stages of review, not just when the complaint is filed. Preiser v. Newkirk, ___ U.S. ___, 95 S. Ct. 2313, ___ L.Ed.___ (1975), citing Steffel v. Thompson, 415 U.S. 452 (1974).

In the present case, inmate Tanzi was afforded legal counsel and a hearing officer other than the warden in a disciplinary hearing relating to activity which had been referred for criminal

prosecution purusant to Rule 10(E) of the Disciplinary Procedures at Windsor Prison. (Appendix p. 84). This procedure had not and has not since been established at other Vermont correctional facilities. On August 1, 1975 Windsor Prison closed and with it ended this policy of providing legal counsel and an independent hearing officer in a disciplinary hearing the subject of which has been referred for criminal prosecution.[6] Any discrepancy between the process the Plaintiff did receive in his transfer hearing and the process he would have received had he been subjected to a disciplinary proceeding no longer exists. Furthermore since the policy of affording legal counsel and an independent hearing officer does not now or never has existed at any other Vermont facility, there is no reasonable chance that such a discrepancy in procedures will affect the Plaintiff in the future. The equal protection issue raised here on appeal is moot. Citing this court's disposition of The Luparar v. Stoneman, supra, on grounds of mootness due to the closing of Windsor Prison, the Defendants contend that the appeal should be dismissed as regards the equal protection issue.

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[6]This court took notice of the imminent closing of Windsor Prison in its dismissal on grounds of mootness of The Luparar v. Stoneman, Civil No. 74-2617, (2nd Cir. June 23, 1975).

The Defendants also point out that due to the prison's closing no purpose whatsoever can be advanced by requiring that the Plaintiff be brought back to Vermont and given a new hearing. No maximum security facility exists in Vermont. The Plaintiff cannot be securely housed anywhere in the state. Any hearing, no matter what process is afforded and no matter what issues or facts are presented, must necessarily conclude that the Plaintiff be housed outside Vermont in the Federal prison system.

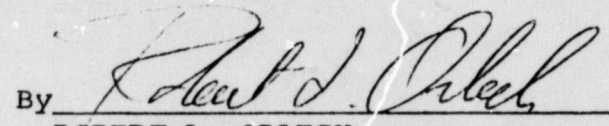
VI. CONCLUSION

For the foregoing reasons, the Court should hold that the Plaintiff-Appellant was not denied Due Process of Law and Equal Protection of Law at his transfer hearing and affirm the District Court's opinion and order.

Dated at Montpelier, Vermont, this 18th day of August, 1975.

Respectfully submitted,

M. JEROME DIAMOND
Attorney General
State of Vermont

By 

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CERTIFICATE OF SERVICE

This is to certify that on the 18th day of August, 1975, I served two copies of the above Brief Of Defendants-Appellees on the Plaintiff in this matter, by mailing same in a sealed envelope, first-class, postage prepaid to James R. Flett, Esq., Correctional Facilities Defender, State Office Building, Montpelier, Vermont 05602.

Robert L. Orleck

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